Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 79-1285

OCTOBER TERM, 1979

JACK MASCHHOFF,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 22 NEWSPAPER GUILD OF DETROIT, and EMIL MAZEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner respectfully prays that a Writ of Certiorari be issued out of this court to review the Order of the Sixth Circuit Court of Appeals of November 8, 1979, affirming the Summary Judgment of the U.S. District Court of Michigan, Eastern District, June 28, 1977 and the January 22, 1980, Order of the Sixth Circuit Court of Appeals denying petitioner's application for rehearing, in pursuance of Section 1254, Title 28, U.S.C.A. — Petition for Writ of Certiorari, in a Civil Proceeding.

OPINIONS AND ORDERS BELOW

The Opinion of the District Court, June 28, 1977, granting Summary Judgment to the defendants, order of District Court, the July 13, 1977 denying motion for rehearing; Sixth Circuit, November 8, 1979 affirming the Summary Judgment, and its order and opinion, January 22, 1980 denying petitioner petition for rehearing have not been reported. They are printed in the Appendix hereto appended.

JURISDICTION FOR ISSUANCE OF WRIT OF CERTIORARI

United States Code Annotated, Title 28, Judiciary and Judicial Procedure, Section #1254.

"COURTS OF APPEALS: CERTIORARI: APPEAL: CERTIFIED QUESTIONS"

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."***

Supreme Court Rule 19(b) "Where a court of appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter *** has decided a Federal question in a way in conflict with applicable decisions of this court; has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, *as to call for an exercise of this court's power of supervision.*" (Our emphasis)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Upon a joint motion of defendants for Summary Judgment should the plaintiff's complaint charging fraud practiced upon the court by defendants and their counsel be accepted as true.

2. Were the District Court and Court of Appeals bound by the rules 601(3) *** "Fraud whether hereto denominated intrinsic or extrinsic," and Paragraph 2(b) "*** to set aside a judgment of fraud upon the court."

3. Was the petitioner (plaintiff) entitled to have his day in court on the charge of fraud upon the court by defendants and their counsel where fraud was not denied.

4. Should the District Court and the Court of Appeals have been concerned with the necessity of preserving the integrity of the judicial process and not condone fraud practiced upon the Court.

5. Should the Supreme Court condone the unpardonable misstatements of facts of the Honorable James P. Churchill, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, and of the US Court of Appeals for the Sixth Circuit, or exercise its power of supervision.

STATEMENT OF FACTS

The Complaint (Filed November 5, 1976 in the United States District Court for the Eastern District of Michigan, Southern Division) is offered as a Statement of Facts because of its inclusiveness.

COMPLAINT

(Filed November 5, 1976)

NOW COMES JACK MASCHHOFF, the above-named Plaintiff, and files this Complaint as an independent action against the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, a voluntary labor association, hereinafter designated as "UAW," and Local 22 Newspaper Guild of Detroit, also known as Newspaper Guild of Detroit, a voluntary labor association, hereinafter designated as the "Guild," and Emil Mazey, individually and as Secretary-Treasurer of the Defendant UAW, and says:

1. That this action is brought under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and, as the allegations hereinafter set forth clearly indicate, justifies relief to the Plaintiff from the operation of the summary judgments complained of in the original suit, in this Court, being Civil Action No. 72 488, in that the Court was misled by the falsehoods presented to the Court and fraudulent actions practiced by the Defendants and their counsel in their respective motions for summary judgment and their arguments at the hearings thereon, which resulted in summary judgments in favor of the Defendants and against Plaintiff.

2. Plaintiff further says that the recent case of *Hines v Anchor Motor Freicht, Inc.* reported in 47 L. Ed. 2d 231 on March 3, 1976 and appearing in pamphlet form, April 9, 1976 (a case involving similar questions of fact and law as in the original case at bar, decided by the Supreme Court of the United States), wherein the Supreme Court reviewed some of the decisions relied upon by this Court in his findings and opinion in

Plaintiff's original case, particularly the case of *Vaca v Sipes*, 386 U.S. at 182, 17 L. Ed. 2d 842, 87 S. Ct. 903. The Supreme Court's opinion clearly demonstrates and establishes that Plaintiff in the case at bar, and in the original proceeding, was and is entitled to a trial upon the merits by a jury.

3. That Plaintiff was a member of good standing of Defendant Guild during all the time that he was employed by the Defendant UAW; that his dues were automatically deducted by the UAW and paid to the Guild; that since his layoff he has attempted to pay his dues to the Guild and has been unsuccessful in so doing.

4. That for a number of years prior to and up to the date of June 19, 1970 he was employed by the Defendant UAW at the International Headquarters in the City of Detroit.

5. That he instituted his original suit against the Defendants in the Circuit Court for the County of Wayne, State of Michigan, which has concurrent jurisdiction with the United States District Court of the matters complained of by Plaintiff; that said Defendants caused his suit to be removed to this United States District Court on the ground that his cause of action came within the meaning of Section 301(a) of the Labor-Management Relations Act of 1947.

6. That Defendant Guild now represents and did represent the employees of the Defendant UAW who are identified with all aspects of the publicity work for the Defendant UAW including photography and art work.

7. That during the year 1947 Plaintiff was a student at Wayne University in the City of Detroit, studying

under what is commonly known as the G.I. Veterans of the Armed Forces of the United States Educational Benefits Bill, he having been honorably discharged and returned from active service in the Air Force of the Armed Forces of the United States during the Second World War in which he was engaged in a number of bombing missions over Germany.

8. That he was informed that Defendant UAW was desirous of hiring someone with experience in photography and art work, and was advised by his university instructor to make application for the job.

9. Plaintiff further says that he did make application, was hired by Defendant UAW, and became a member of Defendant Guild, the union representing employees of the UAW in Plaintiff's category. He performed his duties up to and including the date of his "layoff," June 22, 1970; that he was identified with the publicity work of the said UAW, including photography, art work, and other aspects of publicity as required by the UAW.

10. Plaintiff says that in his association with the UAW he performed his duties for upwards of twenty (20) years; that he continued doing the work he had been doing and was doing until June 8, 1970 which work was most comprehensive, including artist and display design, all areas of still photography and cinematography and television animation; that his work included art work for political candidates endorsed by Walter Reuther, then President of the UAW, and the UAW; that in this work he had done his work competently, successfully, and earned the commendation and approval of Defendant UAW; that he worked in close association with the late Walter Reuther.

11. Plaintiff further says that there was and is an agreement between the defendant unions, UAW and the Guild, covering the relationship of employer and employee which was in effect on June 7, 1970 and thereafter, which is hereby made a part hereof by reference, said defendants having copies thereof in their possession. That on June 8, 1970 Defendant Emil Mazey, Secretary-Treasurer of the UAW, sent a letter to the Plaintiff, copy of which is marked "Exhibit A," attached hereto and made a part hereof; that in claimed accordance with the said letter Plaintiff was laid off and refused employment by Defendant UAW, which refusal has continued to the date hereof.

12. That the work Plaintiff had been doing for the Defendant UAW was not discontinued as claimed, but has been and is being carried on by others, and that the statement of Defendant Emil Mazey that the work which was being performed by Plaintiff was being discontinued was and is untrue and was used as a subterfuge to unlawfully discharge the Plaintiff, that a sample of a small fraction of the work done on pamphlets containing work within Plaintiff's classification over a short period of time following his so-called layoff is marked "Exhibit B," attached hereto and made a part hereof.

13. That over the years said Defendant Emil Mazey had developed a prejudice against and ill will towards the Plaintiff without any cause or justification and had sought previously to have him discharged. That Walter Reuther was on very friendly terms with the Plaintiff and particularly satisfied with his work for the UAW, and despite the antagonism of Defendant Mazey continued to employ said Plaintiff on behalf of

Defendant UAW. That when Walter Reuther suddenly died on May 9, 1970 Defendant Emil Mazey ordered the "layoff" of the Plaintiff without any just cause as hereinabove described.

14. That the Plaintiff as a member of the Guild had and has sought to have the Defendant Guild further and fully process his grievance against the UAW through the grievance procedure established by the agreement between the two defendant labor organizations, supra. That despite the fact that Plaintiff's grievance against the UAW admittedly had and has not been satisfactorily settled, the Guild has worked in collusion with the other Defendants to deprive Plaintiff of his rights under the Constitution of the Guild and the Collective Bargaining Agreement between the defendant unions, particularly Paragraph 11, page 102 of the aforesaid Constitution which inter alia, provides:

> "JOB SECURITY: Protection shall be provided against dismissals except for just and sufficient cause, against dismissals as a result of the contract, against dismissals as the result of introduction of new or modified processes or equipment, and against pay cuts. Dismissals to reduce the force, as distinguished from dismissals for just and sufficient cause, shall not be made unless and until the employer establishes that such dismissals are necessary to insure survival of the property and all other means of economy have been exhausted. The right to question dismissals shall be maintained."

15. That it was the duty of Defendant Guild to properly represent the Plaintiff in his grievance against the UAW; that the Defendant Guild knew or should

have known that contrary to the claim of the UAW, the work which Plaintiff had been doing was still being done for the UAW by others; that Defendant Guild, disregarding its duty to Plaintiff, did enter into collusion with the other Defendants as hereinabove set forth; that Plaintiff, as Defendants well knew and did know, is now and has been capable of and able to do the work which he had been doing so well in the past; that by reason of the collusive and unlawful action between the Defendants as hereinabove described, he has suffered and will continue to suffer substantial damages.

16. Plaintiff further says that in his original suit Defendants filed their answers and affirmative defenses, to which Plaintiff filed his answers, which clearly demonstrated that there were material disputed questions of fact which could only be determined upon a trial on the merits by a jury.

17. That said Defendants filed their respective motions for summary judgment which came on to be heard before this Court; that this Court, at the hearing of the Defendants' motions, was grievously misled by the fraud, deceit, and falsehoods singly and jointly practiced by Defendants and their counsel in reference to material and disputed questions of fact, inter alias, as follows:

> a) Defendants made the false statement that the work that was done by the Plaintiff was not being done by anyone else but had been discontinued; this falsehood was repeated eight (8) times in affidavits and court documents whereas Defendants knew that the work was continued and was being done by others, both freelance workers and persons in the employ of

the UAW; that such work, which includes photography and art work, is a vital part of the publicity and public relations program of the UAW. That Plaintiff's right to arbitration was mandatorily asserted in the union-management agreement, though Plaintiff was refused the same because of the collusion of all the Defendants.

b) Defendants, through their respective counsel, claimed that Plaintiff was "laid off" for economic reasons, whereas the reason contained in the notification to Plaintiff stated that the department was being discontinued and "therefore your services are no longer required." (Exhibit A) The subsequent statement of the claimed inadequate financial condition of the UAW for the "layoff" was false, and was repeated thirteen (13) times in documents filed and during the hearing on the motions for summary judgment.

c) That at the time that the Defendants claimed the UAW had insufficient funds Defendant Emil Mazey had prepared a statement showing that the UAW had liquid assets of Eighty-eight Million, Forty Thousand, Eight Hundred Sixty-Nine Dollars and ($88,040,869.63) Sixty-three Cents, which could be readily converted to cash, a copy of which statement is marked "Exhibit C," attached hereto and made a part hereof. At about the same time, Defendant Emil Mazey sent a letter to officers, regional directors, department heads and international representatives advising them that beginning in June the per diem expenses would be increased

from Fifteen ($15) Dollars per day to Twenty ($20) Dollars per day and out of town expense allowance from Ten ($10) Dollars to Twelve ($12) Dollars per day, copy of which letter is marked "Exhibit D," attached hereto and made a part hereof. Further that at the 22nd Constitutional Convention of Defendant UAW at a session on Friday, April 24, 1970, Defendant UAW passed a constitutional amendment increasing the salaries eight (8%) percent for the international executive board and international representatives, etc., a copy of which proceedings of the convention is marked "Exhibit E," attached hereto and made a part hereof.

d) Defendants and their counsel, particularly counsel for Defendant Guild, deliberately made the false statement concerning a time limit for settling Plaintiff's grievance, when said counsel knew, and should have known, that the agreement between the UAW and the Newspaper Guild contained *no* time limit as claimed by Defendants. This false statement with misleading inferences therefrom was repeated five (5) times in court documents, and seven (7) times during the hearing for a total of twelve (12) times.

e) The Defendants sought to and did mislead the Court by making false statements to the effect that Plaintiff was only one of many others laid off at the same time. There were no such layoffs as stated, as the records of the UAW, to be subpoenaed at the trial, will show. Defendants well knew the falsity of the

statement and the misleading inferences to be drawn therefrom, which false statement was repeated ten (10) times in documents and affidavits including during the aforesaid hearing.

f) Defendants, and particularly Defendant Guild, deliberately made the false statement that Plaintiff's grievance was considered by the executive board on two occasions in the fall of 1970, and on both occasions Plaintiff's request for arbitration in pursuance of the union-guild contract was turned down. The true fact is that only once in the meeting of September 17, 1970 the executive board met and voted that the grievance of the Plaintiff be taken to arbitration. A copy of the minutes of the executive board meeting of September 17, 1970 covering the action of the executive board on the matter of arbitration is marked "Exhibit F," attached hereto and made a part hereof. This false statement of Defendants concerning his request for arbitration being turned down was repeated eight (8) times in affidavits, court documents, and including during the hearing.

18. That after his layoff Plaintiff sought at different times to obtain employment from the UAW; that Plaintiff was unsuccessful despite the fact that others who had been "laid off" several months after June 8, 1970 were placed in other positions, shifted under other payrolls, so that in actuality they were not deprived of their earnings; that the Guild failed in its duty under Paragraph 11 of its Collective Bargaining Program, supra, to protect said Plaintiff in his job security.

19. That Plaintiff, being now upwards of 50 years of age finds it difficult and practically impossible to obtain work comparable to what he had been doing; that through the years with the Defendant UAW he had developed an expertise in his field — particularly in relation to labor union publicity work — which is outstanding; that by reason of his loyalty and devotion to the labor union cause he has found it impossible to secure other employment; that he has been unable to secure employment elsewhere in the line of work he had been doing, and has suffered loss of wages; fringe benefits and other advantages as an employee of the Defendant UAW, and will continue to suffer such loss for a long period of time.

WHEREFORE, Plaintiff prays that this Court in pursuance of the decision of the United States Supreme Court in the case of *Hines v Anchor Freight, supra*, set aside the summary judgments entered in favor of the Defendants and reinstate his cause of action so that he may proceed to a trial by jury upon the merits for the recovery of damages sustained by him as hereinabove and previously set forth.

/s/ Jack Maschhoff

DAVIDOW & DAVIDOW

By /s/ Larry S. Davidow
Attorneys for Plaintiff
3210 Book Tower
Detroit, Michigan 48226

Dated at Detroit November 5, 1976

The Exhibits referred to in the above Complaint are set forth in the Appendix to this Petition, at pages 39-44.

ARGUMENT (REASONS FOR GRANTING WRIT)

Defendants in this case filed a Joint Motion to Dismiss on the grounds of *res adjudicata*, but did not file an Answer. This Motion was argued before the Honorable James P. Churchill, U.S. District Judge, on February 14, 1977.

This action is brought under Rule 60(b)(6) of the Federal Rules of Civil Procedure and provides *inter alia*,

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> * * *
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> * * *
>
> (6) any other reason justifying relief from the operation of the judgment."

"This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to, or to set aside a judgment for fraud upon the court."

During the Colloquy between Court and Counsel of February 14, 1977 the Court said, *inter alia*:

(16) "The Court: I want to get this in perspective because I don't think you and they are talking about the same thing. Your position is this is a complaint to set aside the other judgment?

Mr. Davidow: That's right, your Honor.

The Court: You are not in this case asserting the same cause of action you asserted before. You want to get the judgment set aside so you can pursue (17) your original cause of action?

Mr. Davidow: That's right, your Honor.

The Court: There isn't any question that if you were suing on the merits here without setting aside the other judgment that there would be a proper claim of res judicata, the issue has been determined." (R 16-17)

and added,

(18) "The Court: As I see it, the argument before me is whether or not your complaint sets forth a complaint for fraud.

Mr. Davidow: That's right.

The Court: Which would justify the setting aside of the previous order. It hasn't anything to do with the merits of the original claim.

Mr. Davidow: That's right. Except this other language of this same rule, I will direct your Honor's attention again, if I may. The sixth reason, I think, involves fraud:

> '— any other reason justifying relief from the operation of the judgment.' " (R 18)

* * *

(24) "Mr. Davidow: This is the issue that they had lied to your Honor as to the financial condition of the Union at the very time that they were supposed to be broke and unable to spend money they did not have they were increasing the allowances to all of the representative officers in a substantial amount. Figure out four or five hundred International Representatives, $5.00 a day, that is over $2000 a day alone in that one area. Can you say that would have been carried out if the Union had been so abysmally broke?

The Court: This is evidence you assert they made false representations about?

Mr. Davidow: Yes, your Honor.

The Court: Concerning their financial position?

Mr. Davidow: Yes." (R 24)

* * *

(35) "Mr. Davidow: I'm sorry, your Honor, but you may appreciate the fact that I'm very concerned about it. It's a grievous matter for a man who worked twenty years at his age, now confronted with a vacuum so far as work is concerned. Your Honor, Mr. Ice made this statement:

> 'The Guild is not arbitrary. They had reasons for what they did. They weren't discriminatory. There is nothing in which to infer discrimination because the plaintiff was young or old or black or white, nothing from which we can see discrimination.'
>
> "The Court: Did the same thing happen to some other employees at the same time?
>
> "Mr. Ice: 122 persons were laid off, yes."

which was a falsehood. The only one laid off at that time was Mr. Maschhoff, the plaintiff. That was a false statement." (R 35)

* * *

(37) "The Court: Just a second. Is everything you are setting forth in your argument set forth in your complaint?

Mr. Davidow: Yes, sir.

The Court: Everyone of these allegations is set forth?

Mr. Davidow: I'm not sure whether this particular one is in detail as I argued it to you but we (38) say in the language of our complaint that this is, inter alia, examples of, and we feel under circumstances it would take a long while to present every incident of misrepresentation or fraud practiced upon this Court.

Here we have counsel who made the statement in answer to the Court's question, there was a time limit; there is no time limit which must be followed in reference to asking for arbitration. The Union agreement does not fix any time limit and yet they argued that it did. They argue that which was not in the agreement, in the constitution." (R 37-38)

* * *

(40) "Mr. Davidow: As I said a while ago the duty of fair representation is obligatory upon a union because an individual member surrenders his personal right on the assumption that the union will represent him fairly. It's unchallenged here the union did not represent him fairly. It's unchallenged that fraud was practiced upon him, that is what this record shows in this instant case." (R 40)

* * *

(42) "The Court: You are not even talking about the general issue he raises. He has filed a complaint, as he can do, under the rule. It may be too late but his complaint is not to obtain the relief that was adjudicated against him, his complaint is a complaint alleging, he says, fraud and other reasons for setting aside some independent action to set aside the judgment.

You have not pleaded any affirmative defenses. You talk about res judicata. If there is any res judicata it

might be on the motion for rehearing or a previous motion his client filed but your raising res judicata here refers to the issue in the original complaint, doesn't it? That is not the issue before the Court. This is an independent action to set aside the motion. You haven't answered it and you haven't even filed an affirmative defense with respect to it." (R 42)

* * *

(43) "The Court: But he is not raising the merits of his claim by this law suit. He is bringing a separate action to set aside the judgment. If he wins this law suit he has started he doesn't get relief against you except to have the judgment set aside then we go back to the original claim to try the case. So to talk about res judicata is to beg the issue that he has properly raised.

Mr. Whitman: Your Honor, he pled fraud. We can inquire as to whether the pleadings on their face do allege fraud

The Court: That's right, you can do that if that is what you want.

Mr. Whitman: Fraud requires an intentional misrepresentation.

The Court: For this purpose, for a 12(b) motion then I take every allegation he makes as true, do I not?" (R 43)

* * *

(45) "The Court: Yes. I'm not saying you can't find the other kind of motion but anytime somebody comes into this court and makes allegation of fraud I don't want to decide them on some loose basis. I want to look at it correctly. All you raise so far is res judicata. Is the issue of frad res judicata?

Mr. Whitman: The issue of fraud is res judicata in that —

The Court: (Interposing) When did I ever adjudicate, or anybody else, ever adjudicate that?" (R 45)

* * *

(48) "The Court: He is not trying to bring the same action at all. He is not even asking for the same relief. What he is seeking here is to have the other judgment set aside which would not give him the relief he sought in the original action but merely give him his day in court." (R 48)

* * *

(53) "The Court: All right. I realize, gentlemen these are serious allegations that are made and that is the reason I want to take it so very carefully and proceed step by step and not go beyond the pleadings and the way they are raised and I have a much better understanding of what this is all about than when I came in here this morning. I think we all do.

The matter is under advisement." (R 53)

In the Order of the U.S. Court of Appeals for the Sixth Circuit (page 35), the Court stated, *inter alia*:

"Maschhoff, contending that his layoff was in violation of the contract, filed a grievance with the Guild and sought a processing of his grievance through arbitration. Arbitration, however, was never had, and Maschhoff brought an action against the U.A.W., his former employer, and against an officer of the U.A.W., alleging a breach of the contract, and against the Guild, alleging a breach of its duty of fair representation. Judge Churchill, in 1975, granted summary judgment to all defendants, holding that, on the *facts not in dispute*, Maschhoff had no claim against the Guild for failure to

represent him fairly and that therefore both the Guild and the U.A.W. (and its officer) were entitled to such judgment. Maschhoff's appeal to this court was dismissed because his notice of appeal was not timely filed and the Supreme Court denied relief on a petition for certiorari."(Emphasis added)

"Facts not in dispute" (relating to Union fair representation) is a misstatement.

In the Memorandum Opinion of the U.S. Court of Appeals for the Sixth Circuit (page 32), the Court stated, *inter alia*:

> "As a preliminary matter, it should be noted that in the prior action the Court rested its decision on its finding that the defendant Guild had not breached its duty of fair representation. Therefore, the Court did not need to reach the issue of the employer's (UAW's) alleged breach of the collective bargaining agreement; and the allegations in paragraph 17 of the instant complaint concerning the UAW and its agent, Emil Mazey, were totally irrelevant to that decision and consequently were not considered by the Court in reaching this decision.

This statement is wholly false.

Plaintiff claims in case number 75-1922 (Joint Appendix, pp 5a-6a):

7. That the plaintiff has sought to obtain the efforts of the defendant Guild to further and fully process plaintiff's claim through the grievance procedure

established by the agreement between the two defendant labor organizations; the defendant Guild has refused to do so, working in collusion with the other defendants to deny him his right to prove that the layoff was without cause or justification.

8. That the work plaintiff had been doing is still being done, and that the defendant Guild, in collusion with defendants UAW and Emil Mazey, has deliberately and fraudulently refused to fully process plaintiff's grievance, to his great damage and injury; that the plaintiff through the years has done outstanding work for the defendant, UAW, which has been recognized by responsible officers and representatives of the UAW; that he is now and has been capable and able to do the work which he had been doing so well in the past; that by reason of the collusive and unlawful action between the three defendants as herinabove described, he has suffered and will continue to suffer substantial damages." (Joint Appendix, Volume three, pp. 5a-6a)

In *Hines* v *Anchor Motor Freight*, 47 L Ed 2d 246 (1976), the U.S. Supreme Court commented:

> "Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union."

Moreover, U.S. District Judge James P. Churchill violated Rule 60(b)(6) of the Federal Rules of Civil Procedure on the Motion for Summary Judgment. Plaintiff's statement must be accepted as true. The Court made a finding of fact it had no right to make.

> "In reviewing a *dismissal on the pleadings all allegations in the complaint are taken as true, and*

the complaint is construed liberally in favor of the party opposing the motion to dismiss. (citing cases) (Our emphasis)" *Westlake* v *Lucas*, 537 F2d 857, 858 (1976)

"Hence we reach the merits of the dismissal, and we find ourselves in partial disagreement with Judge Henderson. The venerable standard for judging the propriety of a dismissal on the pleadings under the Federal Rule is not contested here. Accepting the allegations in the complaint as true, as we must on a Rule 12(b)(6) motion, Escalera v New York City Housing Authority, 425 F 2d 853, 857 . . . the complaint may not be dismissed 'unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be improved in support of his claim.' " *Guild of Buffalo, Inc v Sedita*, 441 F2d 284, 287 (1971)

The Court of Appeals in its Opinion stated, *inter alia*:

> "The U.A.W. and the Guild filed a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. Although, in the motion, it is stated that the ground therefor is res judicata, it is clear from the oral argument that the court and the parties treated it also as a motion to dismiss for failure to state a proper basis to have the summary judgment set aside on the ground of fraud. Judge Churchill recognized at argument of the motion that res judicata was not involved."

This is untrue, Judge Churchill himself stating that this is an independent cause of action. District Judge Churchill, in his Opinion of June 28, 1977, stated:

> "There are essentially two allegations in this complaint which could bear on the issue of the Guild's possible breach of its duty of fair representation. The first is in paragraph 17(d), which provides in part:
>
> > 'Defendant and their counsel, particularly counsel for Defendant Guild, deliberately made the false statement concerning a time limit for settling Plaintiff's grievance, when said counsel knew, and should have known, that the agreement between the UAW and the Newspaper Guild contained *no* time limit as claimed by Defendants.'
>
> The second is in paragraph 17(f), which asserts in part:
>
> > 'Defendants, and particularly Defendant Guild, deliberately made the false statement that Plaintiff's grievance was considered by the executive board on two occasions in the fall of 1970, and on both occasions Plaintiff's request for arbitration in pursuance of the union-guild contract was turned down. The true fact is that only once in the meeting of September 17, 1970 the executive board met and voted that the grievance of the Plaintiff be taken to arbitration.' "

Plaintiff's Complaint sets forth five areas of fraud:

[(a)—the false statement or misrepresentation; (b)—the true facts]

1. (a) *UAW and Mazey* The work that Plaintiff had been doing was being discontinued, and his services unnecessary.

   (b) The work was not discontinued. It was being done by others, (8a) and is still being done.

2. (a) *UAW and Mazey* Plaintiff had been "laid off" for economic reasons.

   (b) This reason was not asserted in the notice of lay-off, but argued at the hearing. At that time, the UAW had "liquid assets" of $88,040,869.63. (Ex. "C" (17a))

3. (a) *UAW and Defendant Guild* That there was a time limit for settling grievances, and it had expired,

   (b) The union-management agreement contained no time limit.

4. (a) *UAW* At the time of plaintiff's "lay off" many others also were laid off.

   (b) Plaintiff was the only one laid off.

5. (a) *Guild* That plaintiff's grievance had twice been turned down for arbitration by the Executive Board of the defendant Guild.

   (b) The defendant Guild's Executive Board had only once acted upon plaintiff's request for arbitration, and had granted it, and had ordered it. Local officials of the Guild refused to effectuate it. (Ex. "F" 20a)

In the Order of the U.S. Court of Appeals for the Sixth Circuit (page 37), the Court stated, *inter alia*:

> The only fraud alleged as to the Guild in the complaint in the instant case is that it falsely stated in the summary judgment proceedings in the prior litigation that there was an applicable time limit for settling the grievance when in fact there was not and that it falsely stated that the Guild's executive board twice turned down Maschhoff's request for arbitration when in fact it had considered the request only once and had approved it. *There is, however, no allegation as to why*, if such misrepresentations were indeed made as to the time limit for settling the grievance and as to the action of the executive board, Maschhoff was not at fault in failing to bring the documents or other proof, (See "Exhibit F" page 44) which would show otherwise, to the trial court's attention and thereby place these matters in dispute. There is no allegation that the instrument (presumably the collective bargaining contract) that fixed such time limit was not easily available to Maschhoff and no allegation that the minutes of the executive board were not available to Maschhoff by discovery or otherwise.

The Court made a determination of an extraneous fact which had no bearing upon a fraud practiced upon the Court, and ignored the Union Agreement and Constitution of Defendant Guild on the subject of job security. Paragraph 11, page 102 of the aforesaid Agreement provides, *inter alia*:

"JOB SECURITY: Protection shall be provided against dismissals except for just and sufficient cause, against dismissals as a result of the contract, against dismissals as the result of introduction of new or modified processes or equipment, and against pay cuts. Dismissals to reduce the force, as distinguished from dismissals for just and sufficient cause, shall not be made unless and until the employer establishes that such dismissals are necessary to insure survival of the property and all other means of economy have been exhausted. The right to question dismissals shall be maintained."

It is incomprehensible that both U.S. District Judge James P. Churchill and the U.S. Court of Appeals for the Sixth Circuit should be callously indifferent to the proper concern of the Courts to maintain the prestige, dignity, and concern for correcting wrongdoing, as expressed in the following cases:

Toscano v *C.I.R.*, 441 F2d 930 (1971)

"The Court also held that the moving party was not barred by lack of diligence, although it took over 10 years to uncover the fraud after first becoming suspicious.

But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. . . . Furthermore, tampering with the administration of justice in the manner indisputably shown here involved more than injury to a single

litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." (Emphasis supplied)

Taft v *Donellan Jerome, Inc.*, 407 F2d 807, 809 (1969)

"While plaintiff does not have an adequate remedy under Rule 60(b)((3) for fraud, Rule 60(b) *does not 'limit the power of the Court . . . to set aside a judgment for fraud upon the court.'* Such motion must be brought in the court which rendered the original judgment." (Emphasis supplied)

Wilkin v *Sunbeam Corp.*, 405 F2d 165, 166 (1968)

"Although the time for filing the instant motion on the gound of newly discovered evidence has elapsed, Wilkin's reply refers to the Court against which fraud has been practiced.' *Rule 60(b) does not limit the power of a court to relieve a party from a judgment for fraud practiced upon the court.* The district court will, upon application, decide whether the allegation falls into the latter category and we express no view on that issue." (Emphasis supplied)

CONCLUSION

Petitioner's charge of *Fraud Upon the Court* by defendants and their counsel is not denied.

In the unbroken line of decisions of this court and lower courts upon a motion to dismiss or summary judgment, the allegations in the complaint must be accepted as true and be construed liberally in favor of the party opposing the motion.

It is quite distressing to be confronted with a refusal of the Court of Appeals, 6th Circuit and the U.S. District Judge James P. Churchill to follow the mandate and the rule of the U.S. Supreme Court. It is adding insult to injury for the Court of Appeals, 6th Circuit and Judge James P. Churchill to make unbelievable misstatements of fact (which the record clearly discloses) in justifying their opinions and decisions adverse to the petitioner.

The petitioner served his country during the last World War in the Air Force of the Armed Forces of the United States, in which he was engaged in a number of bombing missions over Germany. He was honorably discharged.

At this juncture, he is a victim of the collusive and fraudulent behavior of the two defendant unions, one of which he belonged to, and the other his employer. He is therefore obliged to have recourse to the Judicial system in order to obtain a redress of his grievance.

It has been and is a shattering effect upon him to be confronted with a callous disregard of his rights as a litigant and particularly to find that the Courts to which he made application for relief appear to be untouched by the admitted Fraud practiced upon the Court by the defendants.

It is difficult to comprehend the actions of the Court of Appeals, 6th Circuit and U.S. District Judge James P. Churchill — that they are not distressed or disturbed by the Fraud practiced upon the Court. One is ineluctably driven to the conclusion that Fraud practiced upon the Court is a way of life and acceptable to them.

It is respectfully urged upon this Court that the grievous wrong practiced upon the petitioner be corrected by this Court to the end that he may have his day in Court and make him feel that in risking his life on behalf of our country that the U.S. Judiciary is a shield and a protection and is not complacent about the abuse of the judicial process.

The petitioner prays that a Writ of Certiorari issue as prayed, so that he may proceed to have his day in Court.

Respectfully submitted,

DAVIDOW & DAVIDOW
/s/ L. S. Davidow
Attorneys for Petitioners
3210 Book Tower
Detroit, Michigan 48226

APPENDIX A

JOINT MOTION TO DISMISS

(U.S. District Court for the Eastern District of Michigan, Southern Division)

(Jack Maschhoff, Plaintiff, v International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, Local 22 Newspaper Guild of Detroit, and Emil Mazey, Defendants. Case No. 672319.)

(Filed November 16, 1976)

COME NOW defendants by counsel, and jointly move that the Complaint be dismissed, pursuant to F.R. Civ. Pro. 12(b), on the grounds that this matter is *res adjudicata*. The Motion is based on the pleadings, as well as the records of this Court. The grounds are more fully set out in the Memorandum in Support, filed herewith.

WHEREFORE, defendants ask that the Complaint be dismissed with costs and attorney fees against plaintiff or, in the alternative against Larry Davidow, pusuant to 28 U.S.C. § 1927.

Respectfully submitted,

Miller, Klimist, Cohen,
Martens & Sugerman
2460 First National Building
Detroit, Michigan 48226
(313) 965-7540

By /s/ Bruce A. Miller (P 17746)
Attorneys for Guild Local 22

John A. Fillion (P 12418)
General Counsel
M. Jay Whitman (P 22280)
Assistant General Counsel
800 E. Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

By /s/ M. Jay Whitman (P 22280)
Attorneys for UAW and Mazey

Dated: November 15, 1976

APPENDIX B

MEMORANDUM OPINION

(U.S. District Court for the Eastern District of Michigan, Southern Division)

(Jack Maschhoff, Plaintiff, v International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, Local 22 Newspaper Guild of Detroit, and Emil Mazey, Defendants. Case No. 672319.)

(Filed June 28, 1977)

On April 18, 1975, the Court granted the defendants' motions for summary judgment in Civil Action No. 74-72448. The Court of Appeals for the Sixth Circuit dismissed the plaintiff's appeal from such order; and on May 24, 1976, the United States Supreme Court denied the plaintiff's petition for certiorari. On November 5, 1976, the plaintiff commenced the above-entitled action for relief from judgment, Civil Action No. 76-72319. (While designated as an action pursuant to Rule 60(b)(6), it is clear that this is an independent action, and the Court treats it as such.) Rule 60(b) of the Federal Rules of Civil Procedure authorizes a party under certain circumstances to file a motion for refief from judgment. However, the rule also contains a saving clause which provides that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court."

The plaintiff asserts in his complaint that the Court relied on false statements in reaching a decision. Paragraph 17 of the complaint lists the allegedly false statements. As a preliminary matter, it should be noted

that in the prior action the Court rested its decision on its finding that the defendant Guild had not breached its duty of fair representation. Therefore, the Court did not need to reach the issue of the employer's (UAW'S) alleged breach of the collective bargaining agreement; and the allegations in paragraph 17 of the instant complaint concerning the UAW and its agent, Emil Mazey, were totally irrelevant to that decision and consequently were not considered by the Court in reaching this decision.

There are essentially two allegations in this complaint which could bear on the issue of the Guild's possible breach of its duty of fair representation. The first is in paragraph 17(d), which provides in part:

> "Defendants and their counsel, particularly counsel for Defendant Guild, deliberately made the false statement concerning a time limit for settling Plaintiff's grievance, when said counsel knew, and should have known, that the agreement between the UAW and the Newspaper Guild contained *no* time limit as claimed by Defendants."

The second is in paragraph 17(f), which asserts in part:

> "Defendants, and particularly Defendant Guild, deliberately made the false statement that Plaintiff's grievance was considered by the executive board on two occasions in the fall of 1970, and on both occasions Plaintiff's request for arbitration in pursuance of the union-guild contract was turned down. The true fact is that only once in the meeting of September 17, 1970 the executive board met and voted that the grievance of the Plaintiff be taken to arbitration."

Courts are properly reluctant to overturn prior judgments. As stated in 11 Wright & Miller, *Federal Practice and Procedure*: Civil § 2868, at p. 239:

> "Resort to an independent action may be had only rarely, and then only under unusual and exceptional circumstances. It is not the function of an independent action to relitigate issues finally determined in another action between the same parties."

Although Rule 60(b)(3) specifically abolishes the distinction between intrinsic and extrinsic fraud in a motion for relief from judgment, several decisions have continued to apply it in independent actions for relief. *E.g., Dowdy v. Hawfill*, 189 F.2d 637 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951). While this disctinction has been severely criticized, see Wright & Miller, *supra*, at p. 240, the reasons for the distinction in cases alleging perjury have been set forth as follows:

> "The principal reason for denying equitable relief from a judgment obtained by perjured testimony is that the truth of the perjured evidence was at issue and determined by the court or jury in the original action, and that the fraud involved is therefore intrinsic, rather than extrinsic or collateral, or that the fraud involved is in relation to intrinsic, rather than extrinsic or collateral, matters, and that to grant relief on account thereof would be to try anew isues inolved and determined in the original action." 46 AM Jur 2d, *Judgments*, § 835, at 990.

It is clear that if true, the allegations contained in paragraphs 17(d) and (f) would constitute examples of intrinsic fraud. This Court is of the opinion that *Dowdy, supra,* is sound authority for the proposition that intrinsic fraud will not support an independent action for relief from judgment. It is therefore the decision of this Court that the defendants' motions to dismiss should and will be granted, without special costs pursuant to 28 U.S.C. § 1927.

/s/ James P. Churchill
United States District Judge

Dated: June 28, 1977

APPENDIX C

ORDER

(United States Court of Appeals
for the Sixth Circuit

(Filed November 8, 1979)

(Jack Maschhoff, Plaintiff-Appellant, v International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, Local 22 Newspaper Guild of Detroit, and Emil Mazey, Defendants-Appellees. No. 77-1551)

Before: MERRITT, BROWN and MARTIN,
Circuit Judges.

Plaintiff-appellant, Maschhoff, who had been an employee of the United Automobile, Aerospace and Agricultural Implement Workes (U.A.W.), was laid off in 1970. He was a member of Local 22 of the Newspaper

Guild of Detroit (Guild) which represented U.A.W. employees in Maschhoff's category under a collective bargaining contract. Maschhoff, contending that his layoff was in violation of the contract, filed a grievance with the Guild and sought a processing of his grievance through arbitration. Arbitration, however, was never had, and Maschhoff brought an action against the U.A.W., his former employer, and against an officer of the U.A.W., alleging a breach of the contract, and against the Guild, alleging a breach of its duty of fair representation. Judge Churchill, in 1975, granted summary judgment to all defendants, holding that, on the facts not in dispute, Maschhoff had no claim against the Guild for failure to represent him fairly and that therefore both the Guild and the U.A.W. (and its officer) were entitled to such judgment. Maschhoff's appeal to this court was dismissed because his notice of appeal was not timely filed and the Supreme Court denied relief on a petition for certiorari.

Maschhoff then, in November, 1976, filed the instant action, seeking to have the summary judgment set aside on grounds of fraud. He purported to file the action as in effect a motion under Rule 60(b)(6), Fed.R.Civ.P., but Judge Churchill, correctly we believe, treated it as an "independent action" within the meaning of that Rule since it clearly is such an action.[1]

---

[1] Maschhoff wanted his claim treated as a motion to relieve him of final judgment under Rule 60(b)(6), a catchall provision, to avoid the one year limitation applicable to motions to relieve of final judgment under Rule 60(b)(3) which latter provision specifically deals with fraud. Moreover, for reasons that will be seen, he wanted, at the same time, to have the advantage of the abolition of the distinction between extrinsic and intrinsic fraud that is applicable to motions under Rule 60(b)(3).

The U.A.W. and the Guild filed a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. Although, in the motion, it is stated that the ground therefor is res judicata, it is clear from the oral argument that the court and the parties treated it also as a motion to dismiss for failure to state a proper basis to have the summary judgment set aside on the ground of fraud. Judge Churchill recognized at argument of the motion that res judicata was not involved.

Judge Churchill, in his memorandum dismissing the instant action, first held, we believe correctly, that the allegations of fraud as to the U.A.W. and its officer were irrelevant since his granting of the summary judgment in the prior action was only on the ground that the Guild had not breached its duty of fair representation. Judge Churchill then held that the action must be dismissed as to the Guild because the only fraud alleged as to it is intrinsic rather than extrinsic fraud. The trial court took note of the inapplicability of this distinction if the claim had been made by timely motion under Rule 60(b)(3) and took note of the general criticism of the distinction, even when made as here in an independent action, in 11 Wright & Miller, *Federal Practice and Procedure*, § 2861 at 191 and § 2868 at 240-241. The trial court, nevertheless, chose to follow those authorities that hold that the distinction persists where relief is sought by independent action. 11 Wright & Miller, § 2868 at 240, note 16. This circuit has not ruled on this point, and we need not do so now.

The only fraud alleged as to the Guild in the complaint in the instant case is that it falsely stated in the summary judgment proceedings in the prior litigation that there was an applicable time limit for settling the grievance when in fact there was not and that it falsely stated that the Guild's executive board twice turned down Maschhoff's request for arbitration when in fact it had considered the request only once and had approved it. There is, however, no allegation as to why, if such misrepresentations were indeed made as to the time limit for settling the grievance and as to the action of the executive board, Maschhoff was not at fault in failing to bring the documents or other proof, which would show otherwise, to the trial court's attention and thereby place these matters in dispute. There is no allegation that the instrument (presumably the collective bargaining contract) that fixed such time limit was not easily available to Maschhoff and no allegation that the minutes of the executive board were not available to Maschhoff by discovery or otherwise. Accordingly, we determine that the complaint could have been dismissed under Rule 12(b)(6) because of the failure to make any such allegations in support of his claim for relief based on alleged fraud. 11 Wright & Miller, § 2868 at 238-239.[2]

The dismissal of this action is therefore affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John A. Hehman Clerk

---

[2] The U.A.W. and the Guild allege in their briefs that, as shown by the appendix on appeal in the prior action, the documents relating to these charges were actually before Judge Churchill on the motion for summary judgment. However, since the instant matter was before Judge Churchill on a Rule 12(b)(6) motion for failure to state a claim, we would not consider the other appendix for present purposes.

APPENDIX D

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(Jack Maschhoff, Plaintiff-Appellant, v International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, Local 22 Newspaper Guild of Detroit, and Emil Mazey, Defendants-Appellees. No. 77-1551)

(Filed January 22, 1980)

Before: MERRITT, BROWN AND MARTIN,
Circuit Judges.

Upon consideration it is ORDERED that the motion of plaintiff-appellant for a rehearing be and the same is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John A. Hehman
Clerk

Exhibit "A" (UAW) Inter Office Communication

June 8, 1970

TO Jack Maschoff

FROM Emil Mazey

SUBJECT

Dear Brother Maschoff:

Please be advised that the position of "Visual Aid" in the Public Relations Department is being discontinued. Under these circumstances, your services with the International Union, UAW will no longer be required.

This memo will serve as two weeks' notice in accordance with Paragraph 1 of Article 10 of the Agreement between the UAW and the Newspaper Guild of Detroit.

Fraternally,

/s/ Emil Mazey

EM/pfm
opeiu42
cc: Ted Ogar
Frances D'Hondt
President's Office

Exhibit "B"

PAMPHLET COLLECTION 3-2-73

You Can Do Job Back Home, Education dept., May 1972, union bug No. 3, 12 pages

"Black Lake" -- imprinted over seal, UAW Family Education Center, June '72, 35,000, union bug 105 (Inland Printing), 16 pages full color photos, art work

"This Is UAW" -- Education Dept. 6-72, Inland Printing, 4 pages, Local Union Discussion Leaders Guide

"This Is the UAW" -- 16 pages plus cover, Educ. Dept. Pub. No. 429, April '72, Goodwill Ptg., photos -- Brochure based on new UAW color motion picture, "This Is the UAW," narrated by President Woodcock

"To Secure Your Health" -- Small pamphlet. . "Produced by Alliance for Labor Action-International Union of United Auto Workers," Merkle Press, Washington

"Helping to Solve Your Family's Dental Problems" -- 8 page folder, "A publication of the UAW Ag. Imp. Dept., July 1972 -- 5 drawings, layout

Crossroads 72 -- 8 page pamphlet -- Education Dept., May 1972, union bug 3, 4 drawings

Occupational Safety & Health Newsletter, Jan'y-Feb'y, 1973, 4 pages on 8 1/2 x 11 inches, 2 drawings, layout, pub. soc. sec. dept, union bug 3

A Union that Gives Service -- 8 pages, educ. dept. pub. 342, Jan'y 1972, Cornelius Printing, photos and drawings

Workers Opportunity College -- 16 pages, Educ. Dept. Pub. 407, Rev 1/73, Inland Printing, 9 drawings

You are Needed -- one page poster, 8 1/2 x 11 on card stock, "Victory in '72" -- 'Design: J. Maschhoff' at bottom, printed in Clerical Center

Exhibit "C"

REPORT OF SECRETARY-TREASURER EMIL MAZEY TO THE TWENTY-SECOND CONSTITUTIONAL CONVENTION

DEAR DELEGATE:

In addition to the copy of the detailed audit of the financial records of the International Union, UAW for the year 1969, which we are providing to each delegate in his kit, I wish to use this report to summarize and highlight the financial activities of our Union since the Twenty-First Constitutional Convention held in May, 1968.

We have prepared charts and exhibits showing the financial experience of our Union through February 28, 1970, the closest date to this Convention for which a financial report is available.

Since the inception of our Union, the books and records of the International Union have been audited by a Certified Public Accountant on a semi-annual basis. Copies of these reports in printed pamphlet form are mailed to the four top officers of our Local Unions. Summaries of our audited financial reports are made available to the entire membership of our Union through our official publication, SOLIDARITY. The Officers, Executive Board Members and International Union Trustees receive a monthly detailed financial report.

After each quarterly Executive Board meeting, a summary of the Board's decisions is mailed to all Local Unions. Included in these summaries are the highlights of my financial report to the Executive Board.

RESOURCES

Total Resources of the International Union as of February 28, 1970, amounted to $131,230,408.47.

LIABILITIES

Liabilities of the International Union, consisting of Unpaid Bills and Accounts, Per Capita Taxes to the Alliance for Labor Action and the Canadian Labour Congress, Payroll Deductions to be forwarded and Loans Payable, amounted to $2,020,032.27 on February 28, 1970.

NET WORTH

Net Worth of the International Union, represented by Total Resources less Liabilities amounted to $129,210,376.20 on February 28, 1970

LIQUID ASSETS

Liquid Assets (Resources of the Union which can be readily converted to cash) amounted to $96,040,869.63 on February 28, 1970.

INVESTMENT INCOME

Investment Income was $4,399,933.98 in 1968 and $4,929,415.19 in 1969 for a two-year total of $9,329,349.17.

Exhibit "D" (UAW) Inter Office Communication

May 27, 1970

TO OFFICERS, REGIONAL DIRECTORS, DEPARTMENT HEADS AND INTERNATIONAL REPRESENTATIVES

FROM Emil Mazey, Secretary-Treasurer

SUBJECT OUT-OF-TOWN PER DIEM ALLOWANCES

GREETINGS:

Effective with the first full expense period in June, 1970 (June 7 through June 20), the out-of-town per diem will be increased from $15 per day to $20 per day for all days that a staff member is away from his base and overnight stay is necessary.

A daily allowance of $12 will be given to a staff member on the day he returns to his base from a distance of more than 100 miles. This $12 expense allowance will also be paid to a staff member who travels outside a radius of 100 miles from his base and returns on the same day. This allowance replaces the previous $10 per day allowance.

In connection with out-of-town travel and the resulting high cost to the Union, it is important that only trips that are essential to the work of the Union be taken.

Fraternally yours,

/s/ Emil Mazey

Emil Mazey

EM:AM:lcl
opeiu42aflcio

Exhibit "E"

DAILY SUMMARY

22nd CONSTITUTIONAL CONVENTION OF THE UAW-ATLANTIC CITY N.J.

Friday, April 24, 1970 Fifth Day

* * *

ARTICLE 11, SECTIONS 1 AND 2

Article 11, Salaries, provides a total increase of eight per cent in salaries and benefits for IEB members and International Representatives, effective upon settlement of the 1970 pattern-setting negotations, and a further increase of 7 per cent in August, 1971.

Vice Pres. Woodcock noted that the package will include any increase in fringe benefits pursuant to Article 11, Section 10; that the total increase shall not exceed eight per cent and could be less than that amount.

He said the cost of living by this Fall may go up by more than the eight per cent, and pointed out that no cost of living escalation clause covers the salaries of Board members and staff. The UAW must "substantially exceed this percentage to get any equitable settlement with any one of the Big Three auto companies," he added.

Several delegates proposed setting specific amounts and dates for salary adjustments, and one delegate proposed tying the salary of local union presidents to the salary of International Representatives.

President Reuther warned the press not to take the suggested salary adjustment figures as indicative of the framework of the UAW 1970 collective bargaining program, "because I want to tell you we expect to do a hell of a lot better for the guys in the shop in 1970."

The Constitutional change on staff salaries was adopted.

* * *

Exhibit "F"

MINUTES
EXECUTIVE BOARD MEETING
SEPTEMBER 17, 1970

I. The meeting was called to order at 6:50 p.m. by President James McMahon.

II. Roll Call:

A. Present: James McMahon, Si Alpert, Karen Field, Karl Mantyla, Thomas McMahon Bernice Haun, Floyd Givens, James McDuffie, Oliver Wilson, John Lewis, Carl Haessler, Robert McKelvey, Ed Haun, Ed Price, Larry Wright, Mike Murphy, Ralph Kingzett.

B. Excused: Frank Wilkes, Charles Tait, Bill Kwart.

C. Absent: Louis Cook, Ralph Harris, Jim Stackpoole, Don Konrad, Frances D'Hondt, Dave Dolson, Ken Clover, Ray Birks, Ralph Orr, Mike Duggan, Gene Monahan, Jim Long, Betty Fisher.

II. Minutes of May 21, 1970 Board Meeting:

The following resolution was excluded from the minutes of the May 21, 1970 Executive Board Meeting: It was moved by Carl Haessler that the UAW Unit resolution, adopted by the Executive Board, be sent to the Guild Reporter with a request to publish. Seconded by Ralph Kingzett. Motion carried.

It was moved by Ralph Kingzett to accept the minutes with the above correction. Seconded by several. Motion carried.

The regular agenda was suspended temporarily at the request of President McMahon.

It was moved by Si Alpert that the Executive Board authorize the Executive Secretary to take all steps necessary, up to and including arbitration, to resolve the Community-Labor Unit grievance involving the dismissal of Jack Maschoff. Seconded by Ralph Kingzett. Motion carried.

IV. Treasurer's Report:

The treasurer's reports were given by treasurer Karl Mantyla:

A. Financial: Income for the four month period ending August 31, 1970 was $21,162.28. Expenditures for the same period were $22,076.76 leaving a net loss for the four months May through August of $914.48. Income for the eight month period ending August 31, 1970 was $42,493.80. Expenditures for the same period were $42,452.13 leaving a net profit of $41.67 for the first eight months of 1970.

It was moved by Bob McKelvey to accept the financial report as given. Seconded by Larry Wright. Motion carried

B. New Members: Treasurer Mantyla reported the following new members to be admitted to Local membership:

PONTIAC PRESS

Celia Aldorson - Reporter
Lawrence A. Laurain - Reporter-Photographer
Gerald Lee Nelson - Reporter Photographer

PONTIAC PRESS

Donald D. Newman - Reporter
Henry J. Teutsch - Reporter
Daniel T. Trainor - Reporter

Supreme Court, U.S.
FILED
MAR 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1285

JACK MASCHHOFF,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 22, NEWSPAPER GUILD OF DETROIT, and EMIL MAZEY,

Respondents.

BRIEF IN OPPOSITION FOR UAW AND MAZEY

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BRIEF IN OPPOSITION FOR UAW AND MAZEY

INTRODUCTION

As indicated more fully below, this case stopped being a case in the legal sense when Petitioner Maschhoff in 1975 failed to file a timely appeal from a summary judgment of dismissal of his original Complaint, which was based on the inadequacy of the Complaint itself, and when this Court subsequently denied his previous petition for Certiorari. It has since become somewhat of a "cause" to him or his attorney, and the only thing unusual about this matter is their obvious unwillingness to afford a respectable death to an action that never should have been brought in the first place.

COUNTERSTATEMENT OF FACTS

This case involves a collateral attack *vis-á-vis* an independent action "under" Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C. ——, on a final Summary Judgment of dismissal entered by the United States District Court for the Eastern District of Michigan, Southern Division, in a 1975 civil action between the *same parties* and involving the *same issues* that Maschhoff ultimately seeks to litigate here.[1] Maschhoff alleged there, as he does in the Complaint filed here, that the UAW, his former employer, laid him off ten years ago in violation of the then existing labor contract between the UAW and Respondent Guild Local 22, and that the Guild, his bargaining representative, thereafter breached its duty to fairly represent him by refusing to arbitrate his grievance.[2] The District Court dismissed the Complaint, finding that Maschhoff himself had failed to allege any facts in support of his conclusory allegations of a breach of the duty of fair representation, and that such a breach was a condition precedent to suing Respondents Mazey and the UAW, his employer, for a breach of labor contract.

Maschhoff's appeal from that dismissal was itself dismissed by the Sixth Circuit Court of Appeals for untimeliness.[3] His subsequent petition for a writ of Certiorari was also denied by this Court,[4] a fact conveniently overlooked in his present petition.

Thereafter, on November 5, 1976, Maschhoff filed the instant "independent action" under Rule 60(b), F.R. Civ.

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[1] *Maschhoff* v. *Automobile Workers, et al.*, —— F.Supp. ——, 89 LRRM 2098 (E.D. Mich. 1975).

[2] It was actually the Guild membership that voted in May, 1973 not to take the grievance to arbitration. *Id.*, at 2099.

[3] *Maschhoff* v. *Automobile Workers, et al.*, Docket No. 75-1922, —— F.2d ——, 92 LRRM 2506 (6th Cir. 1975).

[4] *Maschhoff* v. *Automobile Workers, et al.*, Docket No. 75-1338, 425 U.S. 993, 92 LRRM 2502 (1976).

P., seeking to set aside that final judgment because of an alleged fraud upon the district court. Although the "fraud" allegations are set forth in several subsections to paragraph 17 of the Complaint, the District Court noted that only two of them—subparagraphs 17(d) and 17(f) —even remotely touch upon the Guild's duty of fair representation, the finding of no breach of which was the sole basis for the prior dismissal.[5]

Limiting its attention to those allegations, and giving Maschhoff the benefit of all doubt by treating them as though true, the District Court nevertheless found that they were at best examples of "intrinsic fraud" and hence were insufficient to state an independent cause of action to set aside the earlier final judgment for alleged fraud upon the Court. On appeal, the Sixth Circuit Court of Appeals affirmed, noting that even if "intrinsic fraud" was a basis for such an independent action, Maschhoff had not factually alleged any reason why he could not have discovered and fully litigated the alleged "fraud" in the earlier action.

ARGUMENT

The District Court, citing *Dowdy* v. *Hawfill*, 189 F.2d 637 (D.C. Cir. 1951), *cert. den.*, 342 U.S. 830 (1951), properly granted Respondents' Rule 12(b)(6) Motion to Dismiss on the grounds that Maschhoff alleged at best only examples of "intrinsic fraud" and that such "fraud" was insufficient to state an *independent* cause of action for relief from a final judgment. *United States* v. *Throck-*

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[5] A breach of the duty of fair representation is a condition precedent to an employee maintaining an action against his or her employer under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185, for an alleged breach of labor contract. *Vaca* v. *Sipes*, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). An employer, here the UAW, has a right to rely upon the finality of a grievance procedure disposition unless and until a breach of the duty has been established. Maschhoff simply failed to allege facts in his earlier action sufficient to overcome the Dismissal Motion.

morton, 98 U.S. 61, 68 (1878). See also *Serzysko* v. *Chase Manhattan Bank*, 461 F.2d 699 (2nd Cir. 1972), where the Second Circuit noted that even if the extrinsic-intrinsic dichotomy arguably did not survive this Court's decision in *Marshall* v. *Holmes*, 141 U.S. 589, 35 L.Ed. 870, 12 S.Ct. 62 (1891), which it did however, "the test suggested by that case seems to be whether there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action." 461 F.2d at 702 n.2. The other circuits are in accord with that view. See, *e.g.*, *Keys* v. *Dunbar*, 405 F.2d 955, 957-958 (9th Cir. 1969). And see generally 11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2868 at 240 n.16.

The Sixth Circuit on appeal in this case, without deciding whether intrinsic fraud would ever support an independent action for relief from a final decision, simply affirmed on the basis that Maschhoff himself had failed to allege any facts whatsoever showing that he could not have reasonably discovered and fully litigated the alleged false representations in the prior action. Indeed, it is interesting to note and fatal to Maschhoff's position here that the provision of the labor contract that Maschhoff alleges in subparagraph 17(d) of the instant complaint was misrepresented in the earlier action, was not only quoted in the District Court's decision in that case,[6] but was also openly an exhibit in the Joint Appendix later filed in the Sixth Circuit.[7]

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[6] *Maschhoff*, *supra*, 89 LRRM at 2099.

[7] *Id.*, Joint Appendix, p. 29a, Docket No. 75-1922, 92 LRRM 2506 (6th Cir. 1975). Although the Sixth Circuit in the instant case concluded that reaching this point was unnecessary, the fact remains that, as pointed out by Respondents in their briefs below, virtually all of the documents now relied upon by Maschhoff as allegedly evincing the "fraud" were actually included as exhibits in the Joint Appendix filed in the earlier Sixth Circuit appeal.

CONCLUSION

The Petition filed in this case, like the earlier Petition denied by this Court, sets forth no reasons whatsoever for granting review. Accordingly, the Petition should be DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1285

JACK MASCHHOFF
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 22 NEWSPAPER GUILD OF DETROIT, AND EMIL MAZEY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GUILD LOCAL 22 IN OPPOSITION

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QUESTION PRESENTED

Whether the complaint, in an independent action to set aside a judgment for fraud, fails to state a claim upon which relief can be granted, where the alleged fraud pertains to matters at issue in the original action, but there is no allegation that the purported fraud

prevented plaintiff from fully presenting his case, and there is no averment of a deliberately planned and carefully executed scheme to defraud the court or to otherwise tamper with justice.

COUNTERSTATEMENT OF THE CASE

Petitioner Jack Maschhoff was laid off from his employment at the UAW in 1970. His union, Guild Local 22, grieved his layoff but refused to take the grievance to arbitration.

In August, 1974, Maschhoff sued the UAW for breach of collective bargaining agreement and the Guild for breach of the duty of fair representation. The District Court granted summary judgment to defendants.[1] After receiving briefs on the merits, the Sixth Circuit dismissed Petitioner's appeal as untimely.[2] Certiorari was denied.[3]

In November, 1976, his appeal having gone awry, Maschhoff filed the present complaint seeking relief from the prior judgment on the basis of "fraud." The fraud allegedly consisted of false statements by defendants in their affidavits and at oral argument.[4]

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[1] *Maschhoff v. Automobile Workers*, 89 L.R.R.M. 2098 (E.D. Mich 1975).

[2] *Maschhoff v. Automobile Workers*, No. 75-1922 (6th Cir. 1975)

[3] *Maschhoff v. Automobile Workers*, 425 U.S. 993 (1976). The Court also denied rehearing, as did the Court of Appeals and District Court.

[4] Complaint, Paragraph 17, p. 9 of the petition.

Although the complaint purported to be "brought under" F.R.Civ.P. 60(b)(6),[5] the District Court treated it as an independent action to relieve a party from judgment.[6] The court dismissed the complaint because, even if true, it alleged intrinsic fraud, *i.e.*, fraud concerning matters at issue and determined in the prior action. Such fraud was held insufficient to support an independent action for relief from judgment because to grant relief would be to try anew issues previously determined.[7]

The Sixth Circuit affirmed dismissal of the complaint because there was no allegation as to why, if misrepresentations were indeed made, Maschhoff failed to come forward with proofs which would place the misrepresented matters in dispute. And, there was no allegation that the documents in question were not available to Maschhoff through discovery or otherwise. The court felt it unnecessary to rule on the continued vitality of the distinction between intrinsic and extrinsic fraud. Petitioner's Appendix, 34.

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[5] F.R.Civ.P. 60(b)(3) provides for motions for relief from judgment on the grounds of fraud; such motions are subject to a one year limitations period which, for Petitioner, had elapsed. Hence, Petitioner chose the general subsection, 60(b)(6), as his vehicle. But, the grounds specifically enumerated in the previous subsections cannot be used as a basis for relief under subsection 60(b)(6). *Klaprott v. United States*, 335 U.S. 601, 613 (1949); *United States v. Karahalias*, 205 F2d 331, 333 (1953).

[6] Although Rule 60 provides for motions for relief from judgment, it contains a saving clause stating that the rule does not limit the courts' power to entertain an independent action to relieve a party from judgment or set aside a judgment for fraud on the court.

[7] Because the original judgment was based on a finding that the Guild breached no duty and the claim against the UAW was therefore not reached, the District Court discussed only the allegations of fraudulent statements by or on behalf of the Guild. Petitioner's Appendix, 31.

ARGUMENT

The inadequacy of the petition is evident at first reading. Petitioner has failed to present his case with accuracy, brevity and clearness, and that alone is sufficient reason to deny the petition.[8]

Petitioner argues his case only. There is no attempt to demonstrate the larger impact or recurring nature of whatever issues he is trying to advance. Even if there is some issue of public importance lurking in the petition, it is posed, at best, abstractly, and this case is not meaningful litigation for the resolution of such an issue. See *SS Monrosa v. Carbon Black Export*, 359 U.S. 180, 184 (1959).

The decision of the Sixth Circuit is palpably correct. The Court long ago held that an action to set aside a judgment for fraud must involve "some hindrance besides the negligence of the [party]" in presenting his own case. *United States v. Throckmorton*, 98 U.S. 61, 64 (1878). The "absence of any declaration of the means by which the fraud has been discovered or can now be established" is a "fatal defect" in a complaint for relief judgment due to fraud. *Id.* at 70. The critical inquiry is whether the "unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception . . ." *Id.* at 65.

Here, the documents purportedly establishing the alleged fraud were attached to the complaint and appended to the petition. Exhibits A, C, D, and F

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[8] Supreme Court Rule 23.4: "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

(Petitioner's Appendix, pp. 39, 41, 42, 44) *were also presented to the District Court in the original action*, along with the collective bargaining agreement governing arbitration. There is no claim that these or any other documents are false or were kept from Maschhoff and the lower courts.

Nor is there any well-pleaded allegation of "a deliberately planned and carefully executed scheme to defraud" the Petitioner and the courts, as there was in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944). This or similar "tampering with the administration of justice" must be pleaded in order to state a claim for relief from judgment due to fraud on the court. *Id.* at 246.

In short, there is no coherent claim of deception, trick or artifice. Petitioner's argument is no more than an assertion that his version of the facts is true and Respondents' is false. A timely appeal in the original action was the place to make that argument. As the court noted in *Throckmorton*, the "endless nature of the strife" is the mischief of retrying cases via actions for relief from judgment due to fraud. 98 U.S. at 69. That mischief is present here, and Respondents are entitled to repose in this matter.

CONCLUSION

The Court should therefore deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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